Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-111

In re Applications of

DEAS COMMUNICATIONS, INC. File No. BPH-910208MB

HEALDSBURG BROADCASTING, INC. File No. BPH-910211MB

HEALDSBURG EMPIRE CORPORATION File No. BPH-910212MM

For Construction Permit for a
New FM Station on Channel 240A
in Healdsburg, California

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 1992; Released: October 21, 1992

By the Review Board: BLUMENTHAL and GREENE. Board Member ESBENSEN absent.

1. The Board has before it the "Appeal" of Healdsburg Broadcasting, Inc. (Appellant) from the *Memorandum Opinion and Order* (*MO&O*), FCC 92M-874, released August 13, 1992 by Administrative Law Judge Edward J. Kuhlmann (ALJ), which dismissed appellant's application.[1] It also has the "Oppositions" to that appeal filed by Deas Communications, Inc. (Deas) and the Commission's Mass Media Bureau. In brief, the *MO&O* dismissed appellant's application after rejecting its engineering amendment of July 16, 1992.

BACKGROUND

2. The *Hearing Designation Order* (*HDO*), 7 FCC Rcd 3135 (M.M. Bur. 1992), noted that appellant's engineering showing reflected a violation of 47 CFR Section 73.215 in that appellant's signal contour would improperly overlap the protected contour of KKHI-FM. Despite that "violation," and in part because the *HDO* acknowledged that our measurement rules may be "somewhat unclear," the *HDO* did not dismiss appellant's application but permitted an amendment to be filed with the ALJ. 7 FCC Rcd at 3161.[2]

3. On June 19, 1992 (and within the requisite 30 days of the release of the *HDO*), appellant submitted an amendment to cure its signal contour overlap problem. However, in reviewing that amendment, the Bureau for the first time observed that appellant's engineering was not in conformance with 47 CFR Section 73.316(b)(2) relating to azimuth radiation patterns for directional antennas. Responding to a request that appellant Show Cause why its application should not be dismissed because of this latter inconformity, appellant filed a corrective amendment on the same day the Show Cause order issued, July 16, 1992. Appellant asserts [3]:

> In Attachment 1 to HBI's Show Cause Response, Benjamin Dawson, one of HBI's consulting engineers, demonstrated that the August 13, 1991 engineering Pattern Envelope information (Attachment 2 at pages 2-3 of the HBI Show Cause Response) provided [HBI engineer] Mr. Petersen, by Jampro [manufacturer], contained typograghical errors which directly conflicted with Jampro representations to Mr. Petersen in information it provided on August 7, 1991 -- that the slope of the Jampro antenna pattern "will comply with known FCC rules" so that "a protection null will not exceed 2 dB per 10 degrees azimuth." *See* Attachment 2 to the HBI Show Cause Reponse at p.1, the August 7, 1991 Jampro Antenna Data. As Mr. Dawson further indicated in his engineering statement, and as Mr. Dye confirmed in his declaration, although the antenna pattern was intended by Jampro to be symmetrical around the 150 degree bearing, Jampro's typing error resulted in a relative field of 0.64 rather than 0.62 in the relative field value for 190 degrees, resulting in incorrect interpolated values for 185 and 175 degrees in the June 19, 1992 HBI amendment. *See* Attachments 1-3 of HBI Show Cause Response. Jampro provided the corrected data table and pattern plot, Attachment 5 to the HBI Show Cause Response, and HBI corrected the 0.02 relative field value error in a corrected amendment which was filed with a Petition For Leave To File Corrected Amendment concurrent with HBI's Show Cause Response.

Nonetheless, the ALJ held that appellant should be dismissed for "violating the 'hard look' policy and for failing to establish good cause for its violation." *MO&O* at para. 8.[4] This appeal followed.

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[1] This appeal lies as a matter of right. 47 CFR Section 1.301(a)(1).

[2] The *HDO* also dismissed an engineering amendment filed by appellant on September 25, 1991 because of a conflict between a directional pattern tabulation and appellant's sketch. 7 FCC Rcd at 3136 & n.5. That error was corrected.

[3] Appeal at 2-3 (footnote omitted).

[4] *See also id.*, where the ALJ opined:

> Under the "hard look" doctrine it is not up to the processing line to identify defects; that is the applicant's obligation and responsibility. The issue is not as HBI presents it, that only easily noticeable problems are subject to the "hard look." HBI, as the Commission has repeatedly stated, had the obligation to insure that its proposal complies with the rules. If the people that HBI hired to assist in preparing its technical proposal did not

APPEAL

4. Appellant urges: (1) that the correction of its application caused by a manufacturer's typographical error, only twelve days after its revelation, met the Commission's six-point "good cause" test as set forth in 47 CFR Section 73.3522 and *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970); and (2) that the error at issue would not have triggered dismissal under the "hard look" policy. Citing *Magdalene Gunden Partnership*, 2 FCC Rcd 5515, 5513 (Rev. Bd. 1987) [5] and *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982), appellant argues that its error was less serious than the city grade coverage and geographic coordinate errors corrected, respectively, in those cases, and it maintains that "[t]he *Hard Look Processing Guidelines* do not state that a minor violation of Section 73.316(b) renders an application either untenderable or unacceptable for filing."[6]

5. Abandoning the argument made before the ALJ that the *HDO* itself absolutely precluded any consideration of the amendment,[7] the Bureau now argues -- apparently for the first time[8] -- that *Hard Look* is implicated because, in counsel's "opinion," had the Section 73.316(b)(2) defect been discovered on the processing line, appellant's application would not have been designated for hearing but returned as "unacceptable for filing." [9] The Bureau further contends that since "[t]he need to comply with the Commission's rules is always foreseeable,"[10] appellant cannot meet the "good cause" test engineering amendments.

6. Deas echoes the Bureau's reasoning, but relies as well on 47 CFR Section 73.3566(a) of the Rules for the proposition that applications that are "patently not in accordance with FCC rules ... will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.[11] Citing *Pueblo Radio Broadcasting Service*, 5 FCC Rcd 6278 (1990), Deas also submits that appellant's deficiency under Section 73.316(b)(2) was "foreseeable," and that appellant cannot therefore meet the "good cause" test for post-designation amendments.

DISCUSSION

7. *Hard Look Policy.* The questions concerning if, when, and how the old *Hard Look* policy (*see supra* note 6) should be reconciled with the traditional "good cause" test for post-designation amendments set forth in Section 73.3522(a) of the Rules have received much recent treatment. Thus, in *Taber Broadcasting Co.*, 4 FCC 7892, 7893 (1989)(original emphasis), the Commission distinguished prior cases in which it had accepted *engineering* amendments and it rejected an amended *signature page* by stating:

> The tenderability component of the "hard look" standard is intended to detect and eliminate *applications* which at the *initial* stage of processing, contain fundamental errors in key portions therein, in favor of applicants who through compliance with the tenderability standard demonstrate that they are "ready, willing and able" to institute broadcast service. *See Report and Order*, 50 Fed. Reg. at 19940. Subsequent amendments are not required to conform to the tenderability requirements. Nothing in the letter or spirit of the *Report and Order* suggests that its requirements should be so extended.

8. Because it seemed clear that the Commission intended, in the language of *Taber*, that *Hard Look* was intended to be applied only during the "*initial* stage of processing," the Board later held:

> It is clear that these new [*Hard Look* Order] processing guidelines were and are intended to be applied at the *initial* staff review stage, and nothing in the Commission's discussion of its "hard look" policy suggests that it is to be again utilized once the hearing process has begun. Insofar as we are aware, the singular standard for application amendments, once a hearing has been designated, remains as set forth in Section 73.3522(b) of the rules, 47 CFR Section 73.3522(b); under that standard, minor ministerial mistakes that do not disrupt the hearing proceeding are rather freely permitted. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988)(subsequent history omitted); *see also Family Broadcasting Group*, 93 FCC 2d 771, 774-775 (Rev. Bd. 1983), *review denied*, FCC 83-559, released November 29, 1983. We shall not unilaterally extend, or apply retroactively by our own ukase, the processing standard established expressly for *initial* staff review of a broadcast application.

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check it for compliance with the rules, that is not an excuse. As it turns out, HBI's technical proposal violated more than one Commission rule. From the circumstances presented here it is evident that HBI did not exercise due diligence. HBI had years to review its proposal and following release of the HDO it had notice that all was not right and that it was vulnerable to dismissal. The error was not esoteric since the required showing is governed by rule and there is no evidence a violation of the Commission's technical rules is *de minimis*. The Bureau has indicated that HBI's failure to comply with Section 73.316(b)(2) would have resulted in HBI's application being dismissed if it had been discovered before designation of this case for hearing.

[5] *Aff'd, Marin TV Services Partners, Ltd. v. FCC*, 936 F.2d 1304 (D.C. Cir. 1991).

[6] Appeal at 5, citing *Statement of New Policy Regarding Commercial FM Applications ("Hard Look" Guidelines)*, 58 RR 2d 166, 168 (1985). For the reasons set forth therein, the Commission just recently modified its 1985 *Hard Look* approach, *see Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992), but it there stated that the 1985 *Hard Look Guidelines* would continue to be applied to applications filed prior thereto. *See RDH Communications, Limited Partnership*, FCC 92-379, released August 31, 1992 at n.1.

[7] *See MO&O* at paras. 4-7. We agree with the ALJ. An *HDO* is controlling with respect to a dispute where "specific reasons are stated for [the Commission's] action or inaction in a designation order...." *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 721 (1966). The instant *HDO* does not discuss, let alone resolve, questions concerning Section 73.316 of the Rules.

[8] See Appeal at 5 & n.9.

[9] Bureau Opposition at 3 & n.3.

[10] *Id.*, at 4.6

[11] Deas Opposition at 3 (quoting Section 73.3566(a)).

George Henry Clay, 5 FCC Rcd 317, 318 (Rev. Bd. 1990)(original emphasis). *See generally also Leland Broadcasting Group, Inc.*, FCC 92-368, released August 21, 1992 at para. 9 ("the Bureau correctly noted that the *"hard look"* processing standards do *not* apply to *amendments,"* citing *Taber)* (emphasis added); *American Indian Broadcast Group, Inc.*, FCC 92-390, released August 28, 1992 at para. 7 ("the Commission has held that the *hard look* tenderability requirements do *not* apply to *amendments,"* citing *Taber)* (emphasis added).

9. However, shortly after we issued *George Henry Clay,* the Commission pronounced further on the interplay between *Hard Look* and post-designation amendments. In what seemed to the Board not entirely inconsistent with *Clay,* the Commission declared:

> Although the "hard look" processing procedures did not alter the standards for acceptance of post-*designation amendments,* the policy and precedent associated with the "hard look" necessarily affect the good cause analysis to which post-designation amendments are subject, since otherwise the acceptance of post-designation amendments would undermine the benefits of "hard look."

Pueblo Radio Broadcasting Service, supra, 5 FCC Rcd at 6279 (1990)(emphasis added).

10. Having announced in *Pueblo* that post-designation amendments should be regarded *both* under *Hard Look* and "good cause," the Board then interpreted *Pueblo* by relating:

> That is, while *Hard Look* processing standards are not applied, *per se,* at the post-designation stage, a stage governed by Section 73.3522(b), any attempt to amend a defective application that implicates *Hard Look* deficiencies will be considered in "good cause" determinations, particularly under the "due diligence" prong.

SBM Communications, Inc., 6 FCC Rcd 6484, 6485 (Rev. Bd. 1991). That formulation was not disturbed in the Commission's review of *SBM, see* 7 FCC Rcd 3436 (1992), but the Commission did drop a footnote that states:

> In *George Henry Clay,* 5 FCC Rcd 317, 318 para. 4 (Rev. Bd. 1990), which was not reviewed by the Commission, the Review Board asserted that the "hard look" rules are "legally immaterial" at the post-designation stage of an adjudicatory proceeding. However, in *Pueblo,* 5 FCC Rcd at 6279 para. 6, we stated that the policy and precedent associated with the "hard look" rules necessarily affect the good cause analysis of any post-designation petition for leave to amend a deficient application. Thus, we agree with the Bureau that any post-designation attempt to cure either tenderability or acceptability defects must be analyzed in light of both pertinent "hard look" requirements and ordinary good cause considerations in order to avoid undermining the benefits of the "hard look" policy. *Id.* Consequently, we specifically disavow the Board's holding in *Clay.* Amendments perfecting the tenderability or acceptability of an application after designation for hearing require a showing in light of both the "hard look" rules and the good cause requirements of 47 CFR Section 73.3522(b)(1). *See Pueblo,* 5 FCC Rcd at 6278-79 paras. 5-6.

7 FCC Rcd at 3437-3438 n.5. We are bound by that footnote in the Commission's *SBM.*

11. Notwithstanding the facially flat language of *Taber, Leland Broadcasting* and *American Indian Broadcast Group* suggesting that *Hard Look* is inapplicable to amendments, we are informed further by *Pueblo* and the Commission's *SBM* explication of its critique of *George Henry Clay* that, in contemplating post-designation amendments, we must also consider whether the amendment perfects a "tenderability" or "acceptabililty" defect under *Hard Look.* We must then factor that matter into our "good cause" analysis (although the precise mechanics of this dual exercise have yet to be fully fleshed out).

12. In the case before us, not even the Bureau argues that appellant's application suffers from a threshold "tenderability" defect. *Compare, e.g., SBM,* where in the wake of *Mary Ann Salvatoriello*[12] an application bearing only a facsimile signature was dismissed after hearing designation for lack of a tendered amendment (or, of course, a "good cause" showing). *Compare also Pueblo,* where a post-designation amendment seeking to overcome a U.S.-Mexico Treaty violation was rejected and the application was summarily dismissed as "unacceptable for filing." Pursuant to the Commission's instructions in *Pueblo,* and recalling that the Board does not apply "hard look," *per se,* but merely factors the underlying policy into our larger amendment decisions, we now move to the question of whether appellant's particular error would, with clear precedential support, warrant the draconian remedy of summary dismissal even as late in the process as the hearing stage.

13. We have reviewed the *Hard Look* and its guidelines and find the following with respect to "unacceptability":

> An application found to be sufficient for tender will be studied to determine its acceptability for filing, that is, to determine whether it is in compliance with applicable Commission rules. If it is found acceptable for filing, it will be included in a Public Notice of Acceptance. If found to be unacceptable for filing, it will be returned and will not be accepted later on a *nunc pro tunc* basis.

58 RR 2d at 169 (Appendix D). This says nothing about *post*-designation amendments. Moreover, the precedent shows that the merely because an application may contain a technical error, the Bureau does not automatically dismiss; in fact it frequently invites later amendments before the ALJ. *See, e.g., Peter J. Rinaldi,* 5 FCC Rcd 5649 (M.M. Bur. 1990); *Caprock Educational Broadcasting Foundation,* 5 FCC Rcd 5170 (M.M. Bur. 1990); *Patrick H. Robinson,* 5 FCC Rcd 5146 (M.M. Bur. 1990); *Charles J. Saltzman,* 2 FCC Rcd 4449 (M.M. Bur. 1987); *McDowell Broadcasting Corp.,* 2 FCC Rcd 3283 (M.M. Bur. 1987). *Cf. Key Broadcasting Corp.,* 2 FCC Rcd 3888 (M.M. Bur. 1987)(applicant

[12] 6 FCC Rcd 4705 (1991).

fails to complete ownership section as required in Appendix D; despite "patent" defect, applicant allowed to amend before ALJ).[13] Thus, even if the Board were instructed to apply *Hard Look* "acceptability" guidelines, *per se,* to *post*-designation amendments (which it is not, *see Pueblo, supra),* we could not now say that this applicant had adequate notice that *its* error would automatically trigger summary dismissal, even *after* hearing designation. Nor can we accept as a substitute for such very clear notice the Bureau's *post-hoc, post*-designation "opinion" that, *had* the processing staff unearthed this technical error, appellant's application would have been summarily returned. *Compare Malkan FM Associates,* 935 F.2d 1313 (D.C. Cir. 1991), where the panel majority held that dismissal of an application in the *pre*-hearing stage was justified because of adequate notice of the U.S.-Mexico treaty in Appendix D of the *"Hard Look" Guildelines.*[14] But as the case law shows, sometimes the Bureau dismisses applications with technical errors; and sometimes it doesn't. *Cf. Lopez Radio, Inc.,* 7 FCC Rcd 5320 (1992) (cases discussed in paras. 4-5 thereof ("minimal nature of [technical] defects" not grounds for "unacceptability"; amendments permitted to correct computation errors)). Since the Bureau points to no published case where an applicant has been summarily dismissed for a Section 73.316(b)(2) error, we will not second-guess the processing line at this late stage, nor should appellant (or any applicant) be required to do so.

14. For much the same reason, we rebuff Deas' plea grounded in Section 73.3566(a) of the Rules. Like the Bureau, Deas' points to nothing specific in the *"Hard Look" Guidelines* suggesting that an error in the data submitted under Section 73.316(b)(2) will automatically result in summary dismissal even *after* designation, nor does it dispute appellant's factual explanation for the error. Rather it argues that, although *post-hoc,* the Bureau is of the "opinion" that appellant's application was "unacceptable for filing" and was so "patent" that "any trained engineer could have immediately spotted the error." *See MO&O* at para. 5. But as appellant observed to the ALJ, "four sets of engineers failed to see the problem," *id.,* at para. 6, including the FCC's "trained engineers" as well as Deas' engineers, and the *HDO* makes no reference to it. Hence, it is not surprising that the Bureau itself does not rely upon Section 73.3566(a) as a basis for summary dismissal at this stage. Indeed, by the great weight of its own precedent (*see supra* para. 13), many more "patent" application errors have not triggered summary dismissal, even under *Hard Look* and even *prior to* designation. Having performed our own "hard look" analysis pursuant to *Pueblo,* we now turn to the question of "good cause."

15. *Good Cause.* A party seeking to amend once a hearing has been designated must meet the "good cause" test mandated by Section 75.3522(b) of our Rules, as interpreted in *Erwin O'Conner, supra.* Thereunder:

> the moving party must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage.

22 FCC 2d at 143 (Rev. Bd. 1970). *Accord, Shoblom Broadcasting, Inc.,* 93 FCC 2d 1027, 1028 (Rev. Bd. 1983) (aff'g amendment rejection), 95 FCC 2d 444 (aff'g dismissal of same applicant), *review denied,* FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce Int'l. Broadcasting Co. v. FCC,* 762 F.2d 138 (D.C. Cir. 1985), *cert. denied* 474 U.S. 995 (1985). Perforce, and because engineering amendments may be very disruptive of a multiparty comparative licensing case once the applications have been scrutinized and processed by our Mass Media Bureau engineers, the "good cause" test of *O'Conner* is braced by an additional burden under Section 73.3522(b)(i), to wit:

> That the amendment is necessitated by events which the applicant could not reasonably have foreseen (*e.g.,* notification of a new foreign station or loss of transmitter site by condemnation)...

The case law interpreting these strictures has just been reviewed in *Radio Lake Geneva Corp.,* FCC 92R-72, released September 3, 1992, and we incorporate that extensive analysis here.

16. Initially, and inasmuch as nobody disputes appellant's version of the facts, we find no greater basis to hold that appellant's error here was any more "foreseeable" than was the engineering error in *Magdalene Gunden Partnership, supra.*[15] When affirming *Gunden,* the court observed:

> In defending its decision to allow North Bay's amendment, the Commission argues before this court that North Bay could not have foreseen the need to amend its application because it relied in good faith on its engineer's expertise. North Bay should not be penalized, the Commission contends, because of its engineer's error regarding a highly technical matter. This approach to the foreseeability issue seems inconsistent with the FCC rules that require the applicant, and not the engineer, to provide data supporting the feasibility of its application. *See* 47 CFR Sections 73.3513-73.3516. If an applicant were allowed to shield itself from errors by relying on expert opinions, the potential for abuse would be

[13] We recognize that in the recent *Leland Broadcast Group, supra* para. 8, the Commission held that merely because excused errors in previous cases were "arguably more serious than the defect" there, it was not bound to excuse that applicant's failure to submit a proper site map. *See* FCC 92-368 at para. 9. However, the *Leland* applicant "admitted that its site map failed to meet the specified requirements" set forth in a special *Public Notice.* There is no special *Public Notice* admonishing against appellant's error here.

[14] *Pueblo* extended that same *Hard Look* principle to *post*-designation amendments to cure this Treaty defect.

[15] Indeed, not only does the Bureau often encounter (and allow later amendment, *(see supra* para. 13), many engineering errors a great deal more "foreseeable," it could not apply its facile principle to the *HDO* in this very case and pass its own theoretical muster, since the *HDO* acknowledged and excused one inconsistency with the Rules and entirely missed the error under Section 73.316(b)(2) that it now implies was eminently "foreseeable."

> great. We need not determine whether this policy is in line with FCC rules, however, because the Board did not invoke it here. As we noted, the Board, unlike the ALJ, allowed the amendment because it concluded that *the expert* could not have reasonably foreseen the site issue - not because North Bay relied on its expert's opinion.

Marin TV Services Partners, supra note 5, 936 F.2d at 1307 (original emphasis). Even disregarding the fact that the Bureau's present postulate that "[t]he need to comply with the Commission's rules is always foreseeable," albeit based on an engineer's error, is antipodal to what the Commission argued in *Marin*, we find appellant's engineering error to be no more "foreseeable" than the technical error discussed in *Marin*. The Bureau's glib dismissal of *Marin* consists of its breezy claim that "the facts are so dissimilar," but it offers no explanation whatever for the claimed dissimilarity other than to repeat its conclusory "opinion" that appellant's "amendment was clearly unacceptable for filing and could have been dismissed by the processing line." But this theory presupposes that the Board is to apply *Hard Look, per se*, and at industrial strength at this late stage.[16] This will not wash, *Pueblo*, and we find no rational basis upon which to hold that the error here should be treated more harshly than, if anything, the more "foreseeable" technical error in *Gunden*. Under the unrefuted facts at bar, we find that appellant has met the hurdle erected by Section 73.3522(b)(i). We move next to the standard *O'Conner* test.

17. Because appellant acted within twelve days of discovery of its error and on the very day the Show Cause Order issued, we needn't spend much time on the key question of "diligence." *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982)(due diligence runs from time applicant is or should have been alerted to the defect). Rarely are amendments tendered so swiftly. Similarly, inasmuch as nobody disputes appellant's version of the facts, it is found that appellant was correcting an inadvertance and not purposely changing its directional antenna proposal. Neither would accepting the amendment have required the modification or addition of hearing issues, nor disrupted the hearing. So far as the record shows, nobody has challenged appellant's corrected computation. Finally, acceptance of the amendment would not have legally "prejudiced" Deas,[17] and no comparative advantage would have accrued to appellant. Consequently, appellant in our view does not fail the "good cause" test under any prong.

CONCLUSION

18. In reversing the *MO&O*, we do not especially fault the ALJ, for the Bureau's interpretation and implementation of the old *Hard Look* regime has been confused and confusing to all concerned.[18] The Bureau's multifarious contentions in this case offer a vivid example. First it argued to the ALJ that appellant's correction of its Section 73.316(b)(2) computation error was absolutely barred by the *HDO*, a rejected argument not even proffered again to the Board. Second, it instead submits to us its *post-hoc* "opinion" that, *had* the error been detected on the processing line, appellant's application would have been dismissed automatically as "unacceptable for filing," though it cites nothing in *Hard Look Guidelines* that says that specifically nor any case on this rule. (Nor does Deas.) Third, and failing to support that theory, the Bureau retreats to the all but frivolous proposition that, because "[t]he need to comply with the Commission's rules is always foreseeable," no engineering amendment can survive Section 73.3522(b)(i), thus disregarding this very *HDO* and years of engineering amendment precedent (much of it emanating from the Bureau).

19. Over and above these immediate failings, the Bureau concurrently ignores two of the most cardinal precepts in administrative law. If there is one critical mistake that ensures a reversal by the judiciary, it is the failure to explain rationally an agency action and/or to distinquish prior precedent. *See, e.g., Marin TV Services Partnership*, 936 F.2d 1309-10 at (case remanded for lack of rational explanation of treatment of ownership/management integration); *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir. 1992)(same); *Ventura Broadcasting Co. v. FCC*, 765 F.2d 184 (D.C. Cir. 1985)(decision vacated for lack of rational explanation of spousal attribution); *Cf. Northampton Media Associates v. FCC*, 941 F.2d 1214, 1217 (D.C. Cir. 1991)(agency criticized for lack of rational explanation of treatment of financial documentation). The Bureau offers utterly no explanation, let alone a rational one, as to why we should treat this error differently from that in *Gunden* insofar as "foreseeability." We won't.

20. Equally as egregious is the Bureau's disregard of the court's repetition of another bedrock principle:

> [F]undamental fairness ... requires that an exacting application standard, enforced by the severe sanction of dismissal without consideration on the merits, be accompanied by *full* and *explicit* notice of all prerequisites for such consideration. *Id.* at 871-72 (emphasis supplied); *see also Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.)("[E]lementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected."), *cert. denied*, 429 U.S. 895 (1976); *Radio Athens, Inc. v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)("When the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration.").

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[16] *See* Bureau Opposition at 5.

[17] *Cf. Crosthwait v. FCC*, 584 F.2d 550, 555 (D.C. Cir. 1978)(opponent has no "vested interest" in disqualification), cited in *Radio Lake Geneva Corp., supra*, at para. 15.

[18] A singular illustration of this condition can be had by comparing the Bureau's position in this case with its position in *Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991). While the Bureau would here preclude an applicant from correcting a relatively minor technical error, it insisted in *Radio Associates* that an applicant be permitted to amend after designation to provide, without the *barest* "good cause" showing, a financial proposal 2 1/2 years after it had certified its application to swear it had *no* finances. *Non sequitur*. (Although *Radio Associates* was not reviewed, the Commission just cited and relied upon that case. *See* Brief for Appellee at 9-13, *Sharron Annette Haley v. FCC*, No. 91-1410 (D.C. Cir.); Brief for Appellee at 4 & n.2, *Prater & Durham v. FCC*, No. 91-1409 (D.C. Cir.). We have little doubt that the Commission's recent modification of *Hard Look, see supra note* 6, was intended, in part, to improve the situation.)

Malkan FM Assoc., supra, 935 F.2d at 1318-19 (internal quotes omitted). Here the Bureau would impose what Judge Williams called in that case the "sudden death" of dismissal (dissenting opinion), notwithstanding that unlike *Malkan* where the court allowed pre-hearing dismissal, no clear notice forewarned of a similar consequence for a *de minimis* miscomputation under Section 73.316(b)(2) once a hearing has been designated. Where explicit notice is lacking, the court will simply not sustain an abrupt dismissal, even *before* hearing designation. *Salzer v. FCC,* 778 F.2d 869 (D.C. Cir. 1985).[19]

21. Henceforth, the Board will not entertain claims of an absolute amendment bar under *Hard Look* unless clear and express notice warns that a particular deficiency will invariably provoke automatic summary dismissal. *See generally, e.g., Pueblo, supra.*[20] Apart from that, we will not permit a party to come in through the back door (*i.e., post*-hearing designation) with an attempt to push an applicant back through the front door of *Hard Look* after it has paid its application fee, survived Bureau processing, paid a hearing fee and incurred legal and engineering expenses, *etc.*[21] We do not believe that this clear and specific notice requirement "undermines" the purposes of *Hard Look,* but merely implements the reasonable demands of *Salzer* and *Malkan.* Following the Commission's advice in *Pueblo,* we will shift the focus of our attention to Section 73.3552, the rule governing *post*-designation amendments, and apply engineering amendment precedent of long-standing.

22. ACCORDINGLY, IT IS ORDERED, That the amendment filed by Healdsburg Broadcasting, Inc. on July 16, 1992, IS ACCEPTED; its Appeal filed August 20, 1992, IS GRANTED, and its application (File No. BPH-910211MB) IS REINSTATED in this proceeding).[22]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[19] Because we find that no specific rule or case plainly bars the subject amendment, we do not trangress the teaching of *Reuters Ltd. v. FCC,* 781 F.2d 946 (D.C. Cir. 1986)(agency may not ignore its rules to achieve "equitable" result).

[20] In the case at bar, it's possible that the Section 73.316 defect was not present in appellant's application as filed, but was introduced in the September 25, 1991 amendment that was dismissed in the *HDO* by the Bureau's processing line without consideration of that error. Although not argued by parties, appellant's July 19, 1992 amendment at issue here more closely resembles a "defective" amendment, *see, e.g., Taber,* rather than a "curative" one, since the particular deviation introduced thereby was not present in the original application. This suggests that "hard look" may be completely inapposite to this case. Pueblo and *SBM* may also be distinguishable from the instant case because they address the applicability of "hard look" to amendments attempting to cure defects, in *Pubelo* an "acceptability" defect and in *SBM* a "tenderability" defect, present in the underlying applications considered by the processing line. Here, because the Section 73.316 error might not have been part of appellant's application while it was before the Bureau during the pre-designation stage of this proceeding, but introduced in an amendment directed to the ALJ, it is also possible to conclude that, consistent with *Pueblo* and *SBM,* the "hard look" policy is not at all apposite here. We do not decide.

[21] *Cf. Communi-Center Broadcasting Inc. v. FCC,* 856 F.2d 1551 (D.C. Cir. 1988)(law disfavors flash dismissals; strong justification must support dismissal rather than resolution on merits).

[22] We are making prepublication copies available to the ALJ and party counsel.